

NLWJC - KAGAN

STAFF & OFFICE - D.C. CIRCUIT

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Kagan - FBI Draft 4/99

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. form	ABA Personal Data Questionnaire (23 pages)	n.d.	P2, P5, P6/b(6)
002. memo	Charles Ruff to President William J. Clinton re: Court of Appeals for the D.C. Circuit [partial] (3 pages)	11/24/1998	P2, P5, P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Sarah Wilson
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FOLDER TITLE:

Kagan - FBI Draft 4/99

2009-1006-F

kh557

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

Freedom of Information Act - [5 U.S.C. 552(b)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
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b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

THE WHITE HOUSE
WASHINGTON

Eric -

Attached are two copies
of my FBI form. I have
left SS blank until we
decide what to do on this
issue.

Elena

Withdrawal/Redaction Marker

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THE WHITE HOUSE

Chief of Staff

MR. PRESIDENT:

UNLESS we move
on THIS soon, we'll
never get someone
confirmed.

As you know,
my recommendation
is to pick Elser
now, and if another
seat (walc) opens,
give it to Snyder.

One way or the
other, we should
decide.

TOM

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THE WHITE HOUSE
WASHINGTON

November 24, 1998

MEMORANDUM TO THE PRESIDENT (via John Podesta)

FROM: Charles F.C. Ruff
Counsel to the President

SUBJECT: Court of Appeals for the D.C. Circuit

I. INTRODUCTION

During your first term, four seats on the United States Court of Appeals for the D.C. Circuit became vacant. Judith Rogers, formerly Chief Judge of the D.C. Court of Appeals, and David Tatel, a partner at Hogan & Hartson, were confirmed during your first term. In 1995, Merrick Garland, Principal Associate Deputy Attorney General, was nominated to fill one of the two remaining vacancies and was finally confirmed in the spring of 1997, largely because of the support of Senator Hatch. Garland's confirmation was delayed because of a dispute over whether there was a need to fill either of the two seats. Republicans on the Judiciary Committee, led by Senator Grassley, have taken the position that Garland's confirmation was conditioned on a promise not to fill the other seat; however, we entered into no such agreement and believe that you should exercise your authority to fill all open seats on the court.¹ Even though it is unlikely that the Judiciary Committee will take action on this nomination, we see only minimal risks in sending a candidate forward.

This memo describes the qualifications of two principal candidates Elena Kagan and Allen Snyder.

P2, P5, P6/(b)(6)

P2, P5, P6/(b)(6)

[002]

Kagan, a University of Chicago law professor on leave to serve as the Deputy Director of the Domestic Policy Council, is well-regarded for both her intellectual depth and her practical political skills. Characterized by the press as a "wonderwonk" and an "all-purpose brain," she

¹ The Republicans will argue that, although there was an increase in case filings in the D.C. Circuit in 1997, the number of terminated appeals also increased, thus decreasing the total number of pending appeals. It should be noted that there is some possibility that Judge Wald will take senior status in the spring, opening another seat, but we cannot be certain.

has earned a reputation in academia as a solid First Amendment scholar and has earned respect on the Hill for her political effectiveness. Although, at 38, Kagan would be considered very young and inexperienced for this highly prestigious judgeship, President Reagan and President Bush nominated several young judges to the courts of appeals during their administrations.

Snyder, a partner at Hogan & Hartson, is viewed as one of Washington's outstanding litigators and appellate advocates. He has argued numerous cases before the D.C. Circuit and the Supreme Court and fits the more traditional federal appellate judicial profile. Snyder's confirmability might be an issue, however, because of his representation of White House officials, and his advocacy of what Senate Republicans will consider "judicial activism" in several school desegregation cases.

II. ELENA KAGAN

A. Biographical Background

Kagan was educated at Princeton (B.A. 1981), Oxford (M. Phil. 1983), and Harvard Law School (J.D. 1986), where she was supervising editor of the law review. Following law school, she clerked on the D.C. Circuit for Judge Mikva and on the Supreme Court for Thurgood Marshall. From 1989 to 1991, Kagan was an associate at Williams & Connolly. She then joined the faculty at the University of Chicago law school, where she was tenured. At Chicago, Kagan taught constitutional law, labor law, civil procedure, and a Supreme Court seminar. She has been a member of the Board of Governors of the Chicago Council of Lawyers, and a public member of the Administrative Conference of the United States.

Kagan served as associate counsel to the President from 1995 to 1996, and as special counsel to the Senate Judiciary Committee during the summer of 1993 for the confirmation hearings of Ruth Bader Ginsburg. When Walter Dellinger became Acting Solicitor General, she was considered briefly to replace him as the head of the Justice Department's Office of Legal Counsel. In 1997, she was appointed Deputy Director of the Domestic Policy Council.

B. Litigation Experience

Kagan had some litigation experience during her two years as an associate with Williams & Connolly.

Obscenity

Kagan assisted in writing the *amicus* brief for the Recording Industry of America in an obscenity case involving the rap group 2 Live Crew and their musical recording "As Nasty As They Wanna Be." The Eleventh Circuit reversed a ruling that the recording was obscene under Florida criminal law, reasoning that the lower court misapplied the Miller community standards test for obscenity.

Criminal Defense

In 1990, Kagan assisted in writing the brief on an appeal to the Second Circuit by Kuang Hsung Chuang, former president and CEO of the Golden Pacific National Bank, from his conviction for bank fraud and conspiracy. The primary issue on appeal was whether the trial court erred in refusing to suppress evidence gathered pursuant to a warrantless examination by the Office of the Comptroller of the Currency. The Second Circuit agreed with the district court that Chuang had not established a legitimate expectation of privacy in the bank documents examined by the OCC, and thus its refusal to suppress the documents was valid.

C. Scholarship

Kagan's major publications are law review articles on First Amendment issues, including several devoted to the issue of how hate speech can be regulated by the state without violating settled First Amendment principles. In "Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine," 63 U.Chi.L.Rev. 413 (1996), Kagan argues that although traditional viewpoint neutrality doctrine eschews any concern for illicit government motive in evaluating the constitutionality of speech restrictions, the Supreme Court has in fact constructed a system of rules that function as devices to detect the presence of impermissible motive.

Kagan's published commentary on Stanford University's hate speech prohibition takes issue with Professor Thomas Grey's defense of the policy as an incidental restraint on speech. In Kagan's view, Stanford's "speech code" is more accurately viewed as a constitutionally vulnerable direct ban on speech, as well as a political mistake that "only undermined serious attempts to advance the goal of equality." *Symposium: Developments in Free Speech Doctrine: Charting the Nexus Between Speech and Religion, Abortion, and Equality*, 29 U.C. Davis L.Rev. 957 (1996).

In "Regulation of Hate Speech and Pornography after *R.A.V.*," 60 U.Chi.L.Rev. 873 (1993), Kagan proposes four means of regulating hate speech without violating the viewpoint neutrality principles strengthened [in her view] by the Supreme Court's invalidation of a hate speech ordinance in *R.A.V. v. City of St. Paul*, 112 S.Ct. 2358 (1992). The four approaches include: 1] the enactment of new bans on conduct that accompanies hate speech, 2] the enactment of viewpoint neutral speech restrictions, 3] the enhanced use of the constitutionally unprotected category of obscenity, and 4] the creation of limited exceptions to the general rule against viewpoint discrimination. According to Kagan, these solutions "ought to be debated and tested in a continuing and multi-faceted effort to enhance the rights of minorities and women, while also respecting core principles of the First Amendment."

Kagan's defense of the judicial confirmation process in her review of Yale Law Professor Stephen Carter's *The Confirmation Mess* cuts both ways politically. Senate Republicans will not appreciate her conclusion that the cause of any "mess" is "the simple attempt of the Reagan and

Bush administrations to impose an ideologically charged vision of the judiciary in an unsympathetic political climate,” but will find support for their own scrutiny of the views of your judicial nominees in her argument that vigorous questioning about a nominee’s judicial philosophy and political views is productive and appropriate.

D. Policy

As Deputy Director of the Domestic Policy Council, Kagan has played a leading role in evaluating and implementing many of your important domestic initiatives. She has received favorable press coverage for her role in crafting and negotiating tobacco legislation with Senator McCain and other Republicans. Despite the failure to enact tobacco legislation, Kagan received positive reviews from all parties to the negotiations. Kagan headed a tobacco settlement panel on regulatory issues, focusing especially on FDA jurisdiction over nicotine in cigarettes.

Kagan has solicited from Labor and Commerce proposals for increasing the immigration quota for computer scientists and other information technology workers, and reviewed an I.N.S. reorganization plan. The plan was denounced by Representative Harold Rogers of Kentucky and other House Republicans as a “papered-over reorganization attempt.” Kagan was also active in organizing and promoting the Administration’s hate crimes summit, and has been involved in the President’s race initiative.

III. ALLEN SNYDER

A. Biographical Information

Snyder, 52, is a partner at Hogan & Hartson. He graduated Phi Beta Kappa from George Washington University (1967) and magna cum laude from Harvard Law School (1971), where he was President of the Harvard Law Review. He then clerked for Supreme Court Justices John Harlan and William Rehnquist. Snyder’s areas of legal practice include appellate litigation, legal ethics and professional responsibility, education law and congressional investigations.

An active member of the D.C. Bar, Snyder has served as Secretary and member of the Board of Governors (1977-78); member of the Executive Committee (1977-78); and Chairman of the Steering Committee for the D.C. Bar Division on Courts, Lawyers, and the Administration of Justice (1975-77). In addition, from 1978 to 1990, Snyder served as a member and then as Chairman of the Board of Professional Responsibility. Snyder has also served on the Board of Directors for the Washington Council of Lawyers.

B. Noteworthy Cases and Activities

School Desegregation Cases

Snyder's highest-profile work consists of representing school boards and individuals pressing for continued funding of school desegregation plans. In the landmark Missouri v. Jenkins case, Snyder represented the Kansas City, Missouri School District ("KCMSD") and interested parents, in seeking adequate funding of a desegregation plan that has been described as the most ambitious and costly remedial program in the history of school desegregation. In Missouri I [495 U.S. 33 (1990)], the Court ruled that a federal district court has the power to order a local government with taxing authority to increase property taxes beyond state statutory limits to preserve Fourteenth Amendment protections by funding a school desegregation plan.

In Missouri II, [515 U.S. 70 (1995)], the Court ruled that the district court exceeded its authority in ordering faculty salary increases and rejected the plan's provision for remedial funding until student achievement levels reached national norms. The Court held that only levels of funding -- and not test scores -- should be considered in determining the plan's success.

Snyder's involvement in Missouri v. Jenkins may be a lightning rod for controversy. Senator Ashcroft served as governor of Missouri during one phase of the protracted litigation, and has aggressively questioned judicial nominees about the case as a prime example of judicial activism. After the court's 1990 ruling, Republican Senators Danforth and Bond introduced legislation for a constitutional amendment that would have deprived federal judges of the power to order local authorities to raise taxes.

Snyder's work on two other school desegregation cases will attract attention from Senate Republicans as well. In Board of School Directors of the City of Milwaukee v. Wisconsin et al., 649 F. Supp. 82 (E.D. Wis. 1985), Snyder successfully argued that the Milwaukee School Board and parents of city schoolchildren has standing to challenge the alleged unconstitutional segregation of Milwaukee's schools. While Snyder's clients survived threshold dismissal motions, since no published decision on the merits exists, it is unclear whether they ultimately prevailed.

Snyder unsuccessfully represented the Richmond School Board in a suit seeking additional funding to eliminate alleged vestiges of prior state-mandated segregation. Bradley et al. v. Baliles, 639 F. Supp. 680 (E.D. Va. 1986). The court dismissed the suit, declaring current levels of school funding to be sufficient, despite lingering signs of discrimination.

Other Civil Rights Cases

In Henry v. First National Bank of Clarksdale, 595 F.2d 291 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980), Snyder successfully defended a federal court preliminary injunction

barring white businesses from obtaining damages stemming from NAACP boycotts and protests in Mississippi pending full appellate review.

Snyder represented black citizens in a controversial police brutality case, Boyd v. Gullett, 64 F.R.D. 169 (1974). Plaintiffs, together with the NAACP, sought to establish procedures and rules to prevent police brutality and illegal acts against African-Americans in southern Maryland. Snyder defeated the defendants' dismissal motion, as well as their claim that police investigatory files were absolutely protected from discovery on privilege grounds.

Church-State Cases

Snyder's representation of religious institutions seeking exemption from federal tax burdens will be favorably viewed by Senate Republicans concerned about free exercise rights. In 1980, Snyder successfully argued on behalf of the states in Alabama v. Marshall, 626 F. 2d 366 (5th Cir. 1980), that sectarian elementary and secondary school employees should be exempt from federal unemployment tax requirements. The Secretary of Labor claimed that the exemption applied only to employees of houses of worship and not church schools. Snyder made a similar argument on behalf of several states as *amici curiae* in St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772 (1981).

C. Other Notable Clients and Cases

In December 1995, Snyder represented Parents, Families and Friends of Lesbians and Gays ("PFLAG") on a pro bono basis in a dispute with Pat Robertson's Christian Broadcasting Network ("CBN"). PFLAG had aired a television advertising campaign focusing on the harm of anti-gay rhetoric, and used CBN footage of Robertson and others making anti-gay statements interspersed with scenes of gay-bashing. CBN wrote letters to television stations that broadcast the advertisements, alleging they were defamatory and violated copyright law. In addition, CBN threatened to sue PFLAG to stop the advertisements, prompting PFLAG to seek Snyder's counsel.

During the 1992 special counsel probe of leaks in the U.S. Senate relating to the Keating Five scandal and Anita Hill's testimony against Clarence Thomas, Snyder represented the Alliance for Justice, a public-interest group that lobbied strenuously against Thomas' Supreme Court nomination. In 1982, Elizabeth Taylor hired Snyder to prevent the ABC network from broadcasting a docu-drama purportedly based on her life. Snyder also represented Court TV at its inception and assisted in Court TV's efforts to install cameras in courtrooms across America. No record of litigation on this issue could be found.

In sum, Snyder has an excellent reputation as an appellate advocate and has handled a large number of cases raising significant federal issues; however, his civil rights work -- especially in the area of school desegregation -- may provoke Republican opposition during the confirmation process.

III. OTHER CANDIDATES

P2, P5, P6/(b)(6)

P2, P5, P6/(b)(6)

IV. RECOMMENDATION

In Elena Kagan and Allen Snyder, you have two very well qualified candidates for the D.C. Circuit, albeit with very different backgrounds. Each comes, as well, with strong support from your senior advisors. Both John Podesta and Erskine Bowles believe that Elena would be a superb judge and that she has demonstrated a wide range of abilities during her tenure in the White House. Sandy Berger, Bruce Lindsey and Cheryl Mills feel equally strongly about Allen Snyder.

In my view, this decision is extremely close and merits a brief discussion at your convenience.

Handwritten initials and checkmarks. The first line has a circled '1' and a checkmark. The second line has a circled '2' and a checkmark.

Approve Elena Kagan for ABA/FBI investigation.

Approve Allen Snyder for ABA/FBI investigation.

P2, P5, P6/(b)(6)

Schedule Discussion

THE WHITE HOUSE

WASHINGTON

June 7, 1999

MEMORANDUM TO THE PRESIDENT (via John Podesta)

From: Charles F. C. Ruff, Bruce Lindsey, Mark Childress, Charles Burson, Melanne Verveer, Eldie Acheson, Sarah Wilson, and Eric Angel

Subject: Judicial Nomination Memorandum

This memorandum notifies you that we are ready to nominate the one appellate court candidate profiled below. You have already approved the selection of this candidate.

Elena Kagan, U.S. Court of Appeals for the District of Columbia Circuit

Elena Kagan, a 39-year-old Caucasian woman, will be a Visiting Professor at Harvard Law School beginning in July 1999. Since 1997, she has served as Deputy Assistant to the President for Domestic Policy and Deputy Director of the Domestic Policy Council. Kagan received a B.A. *summa cum laude* from Princeton University (1981), a M. Phil. from Oxford University (1983), and a J.D. *magna cum laude* from Harvard Law School (1986). Following law school, she clerked on the D.C. Circuit for Judge Abner Mikva (1986-87) and on the Supreme Court for Justice Thurgood Marshall (1987-88). Kagan was then an associate at Williams and Connolly (1989-91). She joined the faculty of the University of Chicago Law School as an assistant professor in 1991 and became a full professor with tenure in 1995. Kagan served as Special Counsel to the Senate Judiciary Committee during the confirmation hearings of Ruth Bader Ginsburg (Summer 1993), and she was Associate Counsel to the President (1995-96). In addition, she has been a member of the Board of Governors of the Chicago Council of Lawyers and a public member of the Administrative Conference of the United States.